SUPREME COURT, U. S.

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No. 458

In the Supreme Court of the United States

OCTOBER TERM, 1970

WESTINGHOUSE ELECTRIC CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner manufactures and services turbine generating equipment and related products (Pet. App. A18). It employs a group of service engineers whose duties are largely nonsupervisory. On occasion, however, some of the service engineers act as lead engineers on "labor contract" projects, and thus exercise

[1] Petitioner offers its customers two types of service arrangements—"technical supervision only" service and a "labor contract service." In providing the former, petitioner furnishes parts and materials at listed prices, and engineering guidance at specified hourly rates per engineer; it does not assume any obligation to supply or pay for the manual labor for the project work. In providing "labor contract" service, however, petitioner, in return for a total project fee, takes on all respon-

supervisory powers within the meaning of Section 2(11) of the National Labor Relations Act (29 U.S.C. 152(11))—(Pet. App. A25–A28). The Board, applying the principle enunciated in *Great Western Sugar Co.*, 137 NLRB 551,[3] included in the bargaining unit of service engineers those engineers who performed such part-time supervisory work, provided that they had spent at least 50 percent of their working time during the preceding 12-month period performing nonsupervisory duties (Pet. App. A29–A31).[4] The sole question presented by the petition is whether the Board in so acting exceeded its authority under Section 9(b) of the Act (29 U.S.C. 159(b)) to determine the appropriate collective bargaining unit.

2. The decision of the court of appeals sustaining the Board's unit determination and enforcing the Board's order requiring petitioner to bargain with the Union[5] is correct and does not conflict with a decision

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sibility for the project work, including the obligation to hire and pay all laborers under terms and conditions it may establish independently, and to furnish all the specified materials and supplies (Pet. App. A21).

[3] In that case, the Board held that individuals employed in a supervisory capacity who spent the major portion of the work year as rank-and-file employees but who were assigned supervisory duties for a remaining period had a sufficient interest in the choice of a rank-and-file bargaining representative to warrant their inclusion in the unit with respect to their rank-and-file duties.

The Board added, however, that, "in the event a bargaining representative is selected, it may not represent any engineer with respect to his supervisory duties" (Pet. App. A31).

[4] The Union, the American Federation of Technical Engineers, ultimately won the election and was certified as the bargaining representative of the service engineers (Pet. App. A33–A34).

of any other circuit. As the court below noted, "in the peculiar circumstances here," where a service engineer is sometimes assigned to a job with supervisory authority and sometimes to a job without, there can be "no perfect, all-weather, answer" (Pet. App. A12). The court properly concluded that the Board's 50 percent formula represents a reasonable balance between the competing interests of the employer and the employees. Employees who spend more than half their time in nonsupervisory work, and who, therefore, share a substantial community of interest with their fellow nonsupervisory engineers, are not to be denied the benefits of the Act because they sometimes serve in a supervisory capacity (Pet. App. A29–A30).

Furthermore, the Board's unit determination is consonant with Section 14(a) of the Act.[1] While that provision permits an employer to refuse to bargain collectively over supervisors in the performance of their supervisory duties, it does not prevent individuals who occasionally act as supervisors from enjoying the

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[1] As the Board found, the "supervisory jobs which the senior engineers may be called upon to perform are not regularly and closely intermingled with their nonsupervisory work activity": rather, their status is full-time, from supervisory to nonsupervisory work for a period of [illegible] time, and their duties in each [illegible] time. Moreover, when employed [illegible] projects, their right to exercise [illegible] extend to any employees in the unit, but is limited to the [illegible] professional craft employees hired for the particular project (Pet. App. A30).

Section 14(a) provides that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

benefits of the Act for those clearly demarcated periods when they function as employees without supervisory status. The Board's accommodation in this case between Section 14(a) and the other provisions of the Act was reasonable and should not be disturbed.

The decisions cited at pages 13–15 of the petition all involve situations where the court found that the individuals involved were in fact full-time supervisors and they are not in conflict with the decision below. Also not in conflict is the decision referred to by petitioners (Pet. 16) in *National Labor Relations Board v. Leland-Gifford Co.*, 200 F. 2d 620 (C.A. 1), which merely holds that an individual with genuine supervisory powers does not lose his supervisory status simply because, due to a change in plant operations, he is temporarily assigned to rank-and-file work.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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